91-1520

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

IN RE: CAR RENOVATORS, INC.

HEART OF DIXIE NISSAN, INC.,
d/b/a DIXIE NISSAN,

Petitioner,

v.

THOMAS E. REYNOLDS, Trustee,
of the Bankruptcy Estate of
Car Renovators, Inc.

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAKE V. BIVONA
Attorney for Petitioner
Counsel of Record for
Heart of Dixie Nissan, Inc.
d/b/a Dixie Nissan
Address of Counsel
1714 4th Avenue, North
Bessemer, Alabama 35020
(205) 425-1665

QUESTIONS PRESENTED FOR REVIEW

Does the payment of restitution to a County District Attorney (DA), pursuant to a statutorily provided for agreement between the debtor corporation's president and the DA which defers criminal prosecution of said president for issuing worthless checks, constitute an avoidable preference under Chapter 7 of the Bankruptcy Code?

a. In light of this Court's language in the case of *Kelly vs. Robinson*, does such a restitution payment fail to meet the avoidable preference requirements under 11 U.S.C. 547 (b) (1) and (2)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW	1
CITATIONS TO OPINIONS BELOW	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
THE ARGUMENT	5
CONCLUSION	12
CERTIFICATE OF SERVICE	13
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases: *Page No.*

Harris v. State, 378 So.2d 257 (Ala.Cr.App.), *Cert. denied*, 378 So.2d 263 (Ala. 1979) 7

In Re Standard Food Services Inc., 723, F.2d 820 (11th Cir. 1984) 9

Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353 (1986) ..... *passim*

Nelson v. County of Santa Clara, 91 Bankruptcy 904 (N.D.Cal. 1988) 4, 5, 9

Steely v. City of Gasden, 533 So.2d 671 (Ala.Cr.App. 1988) 7, 8

Steely v. State, 533 So.2d 665 (U.S. *Cert. Den.* in 490 U.S. 1026) 4, 7

Tolbert v. State, 294 Ala. 738, 321 So.2d 227 (1975) 4

Statutes

Title 11, United States Code, Section 101 1

Title 11, United States Code, Section 547 ..... *passim*

Title 28, United States Code, Section 1254 ..... 1, 4

Title 28, United States Code, Section 1291 3

Title 12, Code of Alabama, 1975, Section 12-17-224 ..... 1, 2, 10, 11

Title 13A, Code of Alabama, 1975, Section 13A-9-13.1 ..... 2, 7

Title 13A, Code of Alabama, 1975, Section 13A-9-13.2 2

Title 13A, Code of Alabama, 1975, Section 13A-9-13.3 2

PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings before the Eleventh Circuit Court of Appeals appear in the caption of this case. It should be noted, however, that the complete name of the Petitioner was not given in those proceedings. The Petitioner is not "Dixie Nissan," but, rather, "Heart of Dixie Nissan, Inc., d/b/a Dixie Nissan."

CITATIONS TO OPINIONS BELOW

The opinion of the United States Eleventh Circuit Court of Appeals is officially reported at 946 F.2d 780 and is annexed as part of the Appendix. The denial of Petitioner's Motion For Reconsideration before the Eleventh Circuit is not reported at this time and is also annexed to the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgement of the Eleventh Circuit Court of Appeals was entered on November, 1991.

Petitioner's Request for Rehearing to the Court of Appeals was denied on December 19, 1991.

The jurisdiction of this Court to review the judgment of the Court of Appeals is conferred by Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

a. Title 11, United States Code, Section 101, Subsections (4), (9), (11), and (50) annexed as part of the Appendix;

b. Title 11, United States Code, Section 547, Subsections (b) and (g) annexed as part of the Appendix;

c. Title 12, Section 12-17-224, Code of Alabama, 1975, annexed as part of the Appendix;

d. Title 13A, Sections 13A-9-13.1, 13A-9-13.2, and 13A-9-13.3, Code of Alabama, 1975, annexed as part of the Appendix;

STATEMENT OF THE CASE

On December 21 and 22, 1988, James H. Gann, as President and on behalf of Car Renovators, Inc., purchased from Dixie Nissan certain car parts and supplies. Gann paid for these parts by means of two (2) separate checks which were drawn on Car Renovator's bank account. These two (2) checks were returned to Dixie Nissan by Car Renovator's bank for "insufficient funds."

The State of Alabama has a Worthless Check Act which provided a methodology to criminally prosecute Gann as an officer of Car Renovators for negotiating worthless instruments. Pursuant to said statute, Dixie Nissan mailed to Gann notice that payment of these two (2) checks was refused. Gann did not act on the notice, so Dixie Nissan obtained two (2) warrants for his arrest from the Jefferson County, Alabama, Bessemer Division, District Attorney's Office after its complaint was evaluated by the worthless check unit of the special services division of the District Attorney's Office pursuant to Title 12 § 12-17-224, Code of Alabama 1975.

Gann was notified in writing that two (2) warrants had been obtained for his arrest and that he could resolve this matter with the District Attorney's Office or he would be formally arrested. Negotiating a worthless instrument is a Class A Misdemeanor in the State of Alabama if convicted.

On February 13, 1990, Gann, as President of Car Renovators, paid the sum of $2744.63 to the District Attorney's Office which consisted of the amount of the two (2) worthless checks, late charges and the check unit's processing fee. Because of Gann's appropriate response to the District Attorney's notice, prosecution of Gann for his crime was deferred, an option available to Gann at the discretion of the District Attorney.

On March 3, 1989, Car Renovators filed a voluntary Petition For Relief under Chapter 11 of the Bankruptcy Code. Thomas E. Reynolds was appointed Trustee of the Estate on May 23, 1989. On June 7, 1989, the debtor's case was converted to a Chapter 7 Bankruptcy and Reynolds was re-appointed Trustee again.

In April, 1989, Reynolds initiated an adversary proceeding within debtor's Chapter 7 case against Dixie Nissan to avoid the sums collected by the District Attorney's Office which were ultimately received by Dixie Nissan.

On July 6, 1990 the Honorable Clifford Fulford rendered a final order in which the Bankruptcy Court declared that the sums received by Dixie Nissan constituted an avoidable preference under § 547 and therefore ruled in favor of the Trustee.

On July 16, 1990, Dixie Nissan filed notice of appeal to the United States District Court For the Northern District of Alabama. Said appeal was assigned to the Honorable C. W. Allgood. After granting an Amicus Curie appearance by the District Attorney and the Alabama District Attorneys Association, submission of briefs, and oral argument, Judge Allgood reversed and remanded the judgment of the Bankruptcy Court on January 3, 1991. Though Judge Allgood found Gann's payment to qualify as a preference, he further decided that criminal restitution imposed under Alabama's Worthless Check Act was excepted from avoidance.

On January 10, 1991, the Trustee filed notice of appeal to the Eleventh Circuit Court of Appeals. The Trustee invoked the Eleventh Circuit's jurisdiction of appeals from all judgments of Federal District Courts pursuant to Title 28 U.S.C. § 1291. Again, the District Attorney and its Association were granted leave to file an Amicus Curie brief. After entertaining oral argument on the issues, the Eleventh Circuit, on November 4, 1991, reversed the Order of Judge Allgood and found Gann's payment to the District Attorney an avoidable preference under § 547. Dixie Nissan petitioned the Eleventh Circuit for rehearing, but said petition was denied on December 19, 1991. Dixie Nissan would now Petition this Court for Writ

of Certiorari as an appeal from a final judgment of a United States Court of Appeals pursuant to Title 28 U.S.C. § 1254 (1). Said Petition is filed within ninety days of the denial of Dixie Nissan's Petition for Rehearing as provided by Supreme Court Rule 13.1 and 13.4.

SUMMARY OF THE ARGUMENT

This case presents a novel issue for the Court to address. Case law concerning the avoidability of restitution paid as a result of a criminal prosecution is scant. This Court, in *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353 (1986) held that restitution obligations, imposed as conditions of probation in state criminal proceedings are not dischargeable in Chapter 7 proceedings. A California United States District Court, in *Nelson v. County of Santa Clara*, 91 Bankruptcy 904 (N.D. Cal. 1988) held that restitution imposed as part of a criminal conviction was not avoidable as a preference under § 547.

The constitutionality of Alabama's Worthless Check Act and its predecessor has been recognized by the Alabama Supreme Court in *Tolbert v. State*. 294 Ala. 738, 321, So.2d 227 (1975) (as to the present Act's predecessor), and reaffirmed by the State Court of Criminal Appeals in *Steely v. State*, 533 So.2d 665, U.S. *cert. den.* in 490 U.S. 1026).

Dixie Nissan would assert herein that in addition to the support provided by the above-cited cases, Gann's payment of restitution to the District Attorney falls outside the avoidable preference requirements of Title 11, § 547(b)(1) and (2). First, as this Court so found in *Kelly*, Gann's payment to the District Attorney was not . . . "to or for the benefit of a creditor . . . ," but rather a restitution Agreement "for the benefit of the State." Second, Gann's payment to the District Attorney was not . . . "for or on account of an antecedent debt. . . . " The purpose was to avoid a criminal prosecution for negotiating a worthless instrument, and to avail for himself the obvious benefits of prosecutional deferral.

Dixie Nissan also asks this Court to consider the ramifications of the Eleventh Circuit's opinion to *all* states which have enacted "bad check" laws and especially those offering deferral of prosecution options if certain criteria are met. It is further contended here that, quoting from *Kelly*: "in light of the interests of the State in unfettered administration of their criminal justice systems;" in further light of the "fundamental policy against federal interference with State criminal prosecutions," Federal court intrusion upon a state statutory deferral process harms not only the prosecutional process, but also the victim *and* the debtor.

THE ARGUMENT

As previously stated, few cases address, directly or indirectly, the issues involved in this appeal. *In Re Nelson*, supra, apparently approaches the avoidability of restitution question more succinctly than any other case. Admittedly there was court-ordered restitution in that case. It is also acknowledged that *Nelson* went no farther than the Federal District Court level in California. *Nelson*, however, relied heavily on this Court's language in *Kelly v. Robinson*, supra, and stressed the importance of interpreting the Bankruptcy Code in such a way as to minimize federal interference with the criminal justice system of a state.

The Eleventh Circuit referred to *Nelson* in its opinion, but "passed" on *Nelson's* finding that restitution was not avoidable because that case involved restitution resulting from a criminal sentence and our case does not. The Eleventh Circuit perceived Dixie Nissan's sole thrust to be that a new exception to the Trustee's avoidance powers should be judicially created. The Court failed to acknowledge Dixie's contention that two (2) of the requirements of 11 U.S.C. § 547 (b) have not been met.

Title 11 U.S.C. § 547, **Preferences**. sets out in part: . . .

> (b) Except as provided in subsection (c) of this section the trustee may avoid any transfer of an interest of the debtor in property —
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt before such transfer was made; . . .

The language of *Kelly v. Robinson* becomes vital. Therein this Court stated:

> " . . . This court has recognized that the State's interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. See Younger v. Harris, supra, at 44-45, 27 L.Ed.2d 699, 91 S.Ct 746. This reflection of our federalism also must influence our interpretation of the Bankruptcy code in this case . . . "

This Court, in the same case, while addressing a Connecticut Statute pertaining to wrongful receipt of welfare benefits and its restitution provisions continued:

> " . . . Although restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but, on the penal goals of the State and the situation of the defendant. . . . "

And to quote from Kelly one last time because, even though it is a restitution discharge case, this language is absolutely applicable to the instant case:

> "Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we

> conclude that restitution orders imposed in such proceedings operate '*for the benefit of* the State' . . . " (emphasis ours)

We now return to *Steely v. State*, supra, and also add *Steely v. City of Gadsden*, 533 So.2d 671 (Ala.Cr.App. 1988), which together constitute a clear picture of how the higher courts of Alabama view its Worthless Check Act. In *Steely v. State*, the defendant challenged the constitutionality of Alabama's Worthless Check Act. Therein, the Court of Criminal Appeals referred to another Alabama case, *Harris v. State*, 378 So.2d 257 (Ala.Cr.App.), *cert. denied*, 378 So.2d 263 (Ala. 1979). The Court stated:

> "'The difference between improper use of a statute as a means of punishment for debt and the proper use of a statute as a means of punishment for a criminal act is intent' . . . "
>
> "The mere negotiation of a check which subsequently is not honored does not necessarily constitute the offense of negotiating a worthless instrument. Section 13A-9-13.1 requires that a person negotiate or deliver 'a negotiable instrument for a thing of value . . . with the intent, knowledge or expectation that it will not be honored by the drawee' Ala. Code, § 13A-9-13.1 (a) (1975) (emphasis added). The intent, knowledge or expectation element cannot be proved by only evidence that the negotiable instrument was worthless. Thus, § 13A-9-13.1, supra, was enacted to prosecute those who negotiate a check or other negotiable instrument with the intent, knowledge or expectation that it will not be honored. The statute does not authorize prosecution of those who mistakenly and unintentionally negotiate a worthless check."

Continuing this line of thought, Title 13, § 13A-9-13.1, Code of Ala. 1975, states in part:

> . . . (b) For the purpose of this Section, it is prima facie evidence that the maker or drawer intended,

> knew or expected that the instrument would not be honored if:
>
> . . . (2) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after delivery, and the maker or drawer shall not have paid the holder thereof the amount due thereon, together with a service charge of not more than $10.00, within ten (10) days after receiving written notice from the holder of the instrument that payment was refused upon such instrument . . .

It would further seem pertinent to this point that, under *Steely v. City of Gadsden*, supra:

> "Commencement of prosecution begins when the court obtains subject matter jurisdiction notwithstanding the fact that jurisdiction of the person has not been obtained (at that time) by service of the warrant." (A valid arrest warrant was issued against Steeley on June 25, 1984, though he was not actually arrested until August 10, 1985. The Court concluded prosecution commenced June 25, 1984.)

It is undisputed prima facie evidence in this case that Gann "intended, knew, or expected" that Car Renovators' two (2) checks to Dixie Nissan would not have been honored since he failed to make the checks "good" within ten (10) days after receiving written notice from Dixie Nissan. In fact, only after receiving notice from the District Attorney that warrants had been obtained for his arrest did he respond. The facts are this: a crime was committed; Car Renovators received value from Dixie Nissan by issuing checks it knew would be dishonored; criminal proceedings commenced against Mr. Gann when the two (2) warrants were issued by the District Attorney; Gann paid restitution to the District Attorney's office which deemed him fit for the prosecutorial deferral process allowed under Alabama law. The logic of *Kelly* applies in that the restitution agreement imposed on Gann as part of his prosecution oper-

ated "for the benefit of the State." It is difficult to see how the State's (or District Attorney's) focus in such a case is any other than rehabilitative and punitive. Thus, the first requirement necessary for a trustee to avoid a preference is sorely missing.

As to § 547(b)(2), Dixie Nissan would concur with the Eleventh Circuit that Gann's payment was "for or on account of an antecedent debt," *if* he had made that payment directly to Dixie Nissan at any time before the District Attorney's Office became involved. However, such is not the case here. Gann did not respond to Dixie Nissan's "ten (10) day notice" as it is called. Only after he had been notified by the District Attorney's office that warrants had been issued for his arrest for negotiating worthless instruments did Gann take affirmative action. His payment to the District Attorney was made not because he owed money to Dixie Nissan, but, rather, because he was in the process of being prosecuted for commission of a class A misdemeanor, a crime which, if Gann had been convicted, could have resulted in considerable fines, imprisonment *and* restitution. *In Re Standard Food Services, Inc.*, 723 F.2d 820 (11th Cir., 1984) is not applicable to the facts of this case.

Failing to meet two (2) of the requirements of § 547(b), the Trustee then does not have a "preference" which can be avoided.

The Eleventh Circuit stated in our case:

> "... a payment for a dishonored check is therefore a payment on account of an antecedent debt, at least when it is not made pursuant to court-ordered restitution based upon a criminal conviction."

There are other reasons for this Court to reverse the Eleventh Circuit's order. The above-quoted portion of its opinion implies that if Gann had been *convicted* of issuing a worthless check, and if he had been ordered by a court to pay restitution to Dixie Nissan, then Dixie Nissan would have prevailed, as per *In Re Nelson*.

Why so great the disparity in potential results when weighing this court-imposed restitution concept against restitution

imposed under an informal agreement with the District Attorney which provides for prosecutorial deferral? Have the courts of our country reached a degree of technicality concerning the Bankruptcy Code such that common sense serves no purpose?

At present there are eleven other states with Worthless Check laws which also have some sort of provisions for deferral of prosecution in appropriate situations (Texas, Arkansas, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Arizona, California, West Virginia and Kentucky — one more, Georgia, has legislation pending). All of these statutes appear to serve the public interest in several ways. For the consistent bad check writer, such a law promises conviction, substantial fines and possible incarceration, in addition to restitution; for the recklessly occasional writer, deferral up to a point, restitution and ultimately conviction and fines; and, for the citizen who once in a year, perhaps, exercises slight fiscal carelessness, another chance.

Thus, we begin with the premise that the Federal Courts should not invalidate the results of state criminal proceedings. Cloaked with this protection, the District Attorney commenced a criminal proceeding against Gann with the issuance of a warrant for his arrest. When that warrant was issued, some court obtained subject matter jurisdiction. When Dixie Nissan presented its complaint to the District Attorney, pursuant to Title 12, § 12-17-224(2)(a), Code of Alabama 1975, said complaint was evaluated by the District Attorney to determine if said complaint was appropriate to be processed under the deferral system. The District Attorney made that determination based upon the guidelines also provided in that same section, all of which are related to prior criminal violations of this bad check statute.

Once approval of the warrants was given for Gann, warrants were issued but held by the worthless check unit until Gann had received a notice which informed him of the existing warrants, but offered him the possibility of deferred prosecution by voluntarily surrendering himself. This Gann did, paid the

District Attorney's office the amount instructed by that office to remit and was granted deferral of prosecution. If Gann had not done so, prosecution would have continued to some conclusion. It should be further noted that also under § 12-17-224 e.1.(ii)I. and II.:

> I. Upon filing a complaint with the worthless check unit, the victim waives the right to collect restitution directly from the defendant.
>
> II. . . . The . . . unit may enter into a restitution agreement with the accused as to the terms by which the accused shall satisfy restitution. . . . The terms of said restitution agreement shall be determined on a case by case basis by the worthless check unit, but the duration of said agreement shall be no longer than six months. . . .

In *Kelly*, this Court, in dissecting Connecticut's restitution statutes, emphasized that the victim had no control over the amount of restitution awarded. In reading the above-cited Alabama Statute it is clear that the terms of restitution repayment vary from case to case and provide for installment repayment plans. It takes no master mathematician to conclude that a $1,200.00 bad check paid back through the District Attorney's Office at $200.00 per month, does not return a true $1,200.00 to the victim.

Dixie Nissan asserts to this Court that the Eleventh Circuit's decision in finding that an avoidable preference took place when Gann paid restitution to the District Attorney's office directly conflicts with this Court's language in *Kelly v. Robinson*. With the enforceability of the deferral of prosecution provisions of the laws of eleven (11), possibly twelve (12) states at stake, the Eleventh Circuit has denigrated a constitutionally valid statutory scheme to the level where a bad check unit appears to be nothing more than a collection agency. This it certainly *is not*. Dixie Nissan does not feel that the Eleventh Circuit adequately addressed the important questions of Federal law which should be settled by this Court.

CONCLUSION

In brief summary, the Eleventh Circuit found an avoidable preference in this case when Gann's restitution payment failed to meet the required criteria. The Court erred in this finding. *Kelly v. Robinson,* admittedly (again) a restitution discharge decision, contains language which certainly has direct application to the case at bar, language which conflicts with the Eleventh Circuit's findings. Dixie Nissan feels this is a case of first impression for this Court to consider. Debtors, creditors, and state prosecutors need to know where they stand in states providing deferral of prosecution processes. What can be more intrusive of the State prosecutorial function than to force a District Attorney to obtain a conviction in order to prevent the avoidance by a Bankruptcy trustee of court-imposed restitution when a mechanism is in place which accomplishes the same result and gives the defendant another chance.

Dixie Nissan, the Petitioner, humbly requests that this Court will issue the Writ of Certiorari, review the issues presented in this Petition, and reverse the decision and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

Jake V. Bivona
Attorney for Petitioner,
Heart of Dixie Nissan Inc.,
d/b/a/ Dixie Nissan

No.

IN THE

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OCTOBER TERM, 1991

IN RE: CAR RENOVATORS, INC.

DEBTOR

HEART OF DIXIE NISSAN, INC.,
d/b/a DIXIE NISSAN,

Petitioner,

v.

THOMAS E. REYNOLDS, Trustee,
of the Bankruptcy Estate of
Car Renovators, Inc.

Respondent.

CERTIFICATE OF SERVICE

I, Jake V. Bivona, a member of the Bar of the Supreme Court of the United States, do hereby, certify that I served the Petition For A Writ of Certiorari to the Supreme Court and Appendix on all parties required to be served, to wit:

Car Renovators, inc.
c/o Alan D. Levine
Levine & Levine, Attorneys
Suite 130 Financial Center
Birmingham, Alabama 35202-3187
(205) 328-0460

Thomas E. Reynolds
c/o Evelyn Y. Teague, Attorney
Haskell, Slaughter, Young and Johnson, P.A.
800 AmSouth Sonat Tower
Birmingham, Alabama 35203
(205) 251-1000

Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 479-3000

on this the 18th day of March, 1992, by depositing 3 copies of the same in the United States mail, properly addressed and first class postage prepaid.

Jake V. Bivona

APPENDIX

A-1

In re CAR RENOVATORS, Debtors.

Thomas E. REYNOLDS, Trustee of the Bankruptcy Estate of Car Renovators, Inc., Plaintiff-Appellant,

v.

DIXIE NISSAN, Defendant-Appellee.

No. 91-7043.

United States Court of Appeals, Eleventh Circuit,

Nov. 4, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

DUBINA, Circuit Judge:

Thomas E. Reynolds, Trustee of the Bankruptcy Estate of Car Renovators, Inc. ("the Trustee"), appeals the district court's order, which held that although a payment by Car Renovators, inc. (the "Debtor") to Dixie Nissan ("Dixie") making good a previously dishonored check is a preference, it is not avoidable by the Trustee because it was restitution. For the reasons which follow, we reverse.

I. STATEMENT OF THE CASE

On December 21 or 22, 1988, the Debtor tendered two checks totaling $2,674.63 to Dixie for the purchase of car parts and other supplies. The two checks were subsequently dishonored by the payor bank due to insufficient funds in the

Debtor's account. Pursuant to Alabama's Worthless Check Act ("the Act") , Ala. Code § 13A-9-13(2) (1975 & Supp. 1990), notice of dishonor was sent to the Debtor giving it ten days to remit the funds to the worthless check unit of Alabama's district attorney's office.[1] The Debtor was also informed that by acting upon the notice it could qualify for deferred prosecution.[2] The Debtor's president, after being informed by the district attorney that two warrants had been issued for his arrest, and within ten days of notice, remitted a cashier's check to the worthless check unit to cover the two bad checks. The district attorney then forwarded to Dixie the funds owed to it because of the dishonored check. The Debtor was never prosecuted.

Within ninety days of the two check transactions, the Debtor filed a Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code ("the Code"), 11 U.S.C. § 101, et seq. Subsequently, the Chapter 11 bankruptcy was converted to a Chapter 7 bankruptcy and the Trustee was appointed. On April 2, 1990, the Trustee filed a complaint to avoid and recover preferential transfers of property pursuant to § 547 of the Code, which allows the Trustee to avoid certain payments made by the debtor within ninety days of the bankruptcy filing.

The bankruptcy court held that because the funds obtained by the district attorney were received and cashed by Dixie within ninety days before the filing of the Debtor's bankruptcy petition, the cashier's check was cashed when the Debtor was insolvent, it was a claim paid from the Debtor's assets under facts and circumstances that satisfied the requirements of § 547 of the Code and, therefore, could be recovered by the Trustee. Dixie appealed to the district court which reversed.

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[1] The worthless check unit was established pursuant to Ala.Code § 12-17-224 (1975 & Supp. 1990).

[2] The Act allows the writer of a dishonored check to avoid criminal prosecution by paying, within ten days of receiving notice of dishonor, the appropriate amount to cover the original check plus costs.

The district court deemed the payment to be criminal restitution and therefore excepted from avoidance in Chapter 7 cases under § 547 of the Code. The Trustee then perfected this appeal.

II. ANALYSIS

Section 547(b) of the Code allows a trustee (on behalf of the creditors) to avoid or to recover certain transfers of property made by a debtor "for or on account of an antecedent debt" in the ninety days before the debtor filed for bankruptcy while the debtor was insolvent.[3] Payment by a check, for bankruptcy purposes, is considered to be equivalent to a cash payment if the check is honored. However, if the check is not honored, as in the present case, the transaction becomes a credit transaction. *See In re Standard Food Services, Inc.*, 723 F.2d 820 (11th Cir. 1984). A payment for a dishonored check is therefore a payment on account of an antecedent debt, at

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[3] § 547 Preferences

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest to the debtor in property —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(b) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

* * * * * *

least when it is not made pursuant to court-ordered restitution based on a criminal conviction. 723 F.2d at 821.

We agree with the bankruptcy court and the district court that the payment by the Debtor of the dishonored check is a preference. Section 547(c) of the Code, however, provides exceptions to the ability of the Trustee to avoid preferences. Dixie does not raise any of the provided exceptions to avoidance. Instead, Dixie argues that § 523(a)(7), which is an exception to discharge, should be extended to apply as an exception to the avoidance power of the Trustee. Section 523(a)(7) excepts from discharge a debt to the extent that it resulted from "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. . . . " Dixie not only wants to add a new exception to the Trustee's power to avoid certain preferences, it also urges us to apply the new exception to preclude the avoidance of a payment that did not result from a criminal sentence.

In *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), the U.S. Supreme Court held that restitution obligations imposed as a condition of probation in state criminal proceedings are not dischargeable under § 523(a)(7) of the Code. Although restitution is not mentioned in § 523(a)(7), the Court excepted restitution from discharge because the section "[P]reserves from discharge any condition a state criminal court imposes as part of a criminal sentence." 479 U.S. at 50, 107 S.Ct. at 361.

In the present case, the district court adopted the reasoning of *In re Nelson*, 91 B.R. 904 (N.D.Cal. 1988), which extended the reasoning in *Kelly* to except criminal restitution from avoidance under § 547 of the Code. The district court went even further by extending the rationale of *Kelly* and *Nelson* to include a payment for a worthless check that was not required as part of a criminal sentence.[4]

---

[4] It is important to note that in this case there is no court-ordered restitution stemming from a criminal conviction.

Even if we were willing to apply § 523 of the Code in an avoidance setting, the federalism policy upon which *Kelly* was based makes its holding irrelevant in a case where the payment in question is not part of the criminal sentence. The Supreme Court in *Kelly* based its holding that restitution was not dischargeable in a Chapter 7 bankruptcy upon the fact that the restitution it was considering was part of a criminal sentence. The Court began with the premise that "[c]ourts traditionally have been reluctant to interpret federal bankruptcy statutes to remit state *criminal judgments*." 479 U.S. at 44, 107 S.Ct. at 358 (emphasis added). The Court goes on to state that when interpreting the statute applicable to the dischargeability debts, it must be interpreted "in light of the history of bankruptcy court deference to *criminal judgments* and in light of the interests of states in unfettered administration of their criminal justice systems." *Id.* (emphasis added). The Court emphasized the significance of the states' interests in enforcing penal sanctions and their interests in controlling criminal prosecutions.

In the present case, since there are no penal sanctions, criminal judgments, nor continuing prosecutions with which § 547 could potentially interfere, the Supreme Court's federalism concern that the bankruptcy courts "should not invalidate the results of state criminal proceedings" is not implicated. 479 U.S. at 47, 107 S.Ct. at 360.[5]

The Debtor chose to avoid possible conviction by making the payment to the district attorney for the worthless check. Although Ala. Code § 12-17-224(a)(2) c, designates the repayment of the bad check as restitution, it is questionable whether the repayment is so similar in nature to a fine that it would come under § 523(a)(7) of the Code. The *Kelly* holding deemed the restitution in the case to be nondischargeable because it was part of a criminal sentence. 479 U.S. at 50, 107

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[5] The Supreme Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions." *See Younger v. Harris*, 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1971).

S.Ct. at 361. The definition of restitution for purposes of the Act materially differs from that considered in *Kelly*. *See* Ala. Code § 12-17-224(a)(2)el(ii). By complying with the requirements of the Act, the Debtor avoided a trial to consider whether he committed the crime of "negotiating a worthless negotiable instrument." Ala.Code § 13A-9-13.1 The Debtor was never prosecuted, convicted, nor sentenced by a state criminal court.[6]

Section 547 of the Code, to the extent that it may interfere with the Act, does not raise federalism concerns under the current facts because the Code merely allows the Trustee to initially avoid the payments. Avoidance and discharge are very different concepts because even if the Trustee can avoid a payment, it is still owed until discharged. The issue of federal intervention in state criminal prosecution can only truly arise where the Code allows the discharge of a payment made as part of a criminal sentence.[7]

III. CONCLUSION

For the foregoing reasons, the district court's order is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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[6]The form of restitution applied within the Act may also fall short of the requirement for exclusion from dischargeability because it may be deemed compensatory in nature. Section 523(a)(7) will not apply to restitution that is solely designed to compensate the victim. Herein the restitution has the appearance of being imposed for the sole purpose of compensating the victim. The Act states no penal or rehabilitative interests. Restitution is based solely on the amount of the dishonored check, bank costs to the victim, and the costs to the district attorney for administering the program. In this case, there was no court hearing for the Debtor to determine the amount or type of restitution due to the victim.

[7]We are not asked in this appeal to determine whether the debt may be discharged, nor are we asked to consider the avoidability of restitution resulting from a criminal sentence. Only when those questions arise will *Kelly* and its progeny become potentially relevant.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In Re:	]	
	]	
Car Renovators, Inc.	]	Case No. BK 89-04485
	]	AP No. 90-00158
Debtor.	]	Chapter 7
	]	
Dixie Nissan,	]	
	]	
Appellant,	]	
	]	CIVIL ACTION
vs.	]	No. 90-A-1701-S
	]	
Thomas E. Reynolds, Trustee	]	
	]	
Appellee.	]	

MEMORANDUM OPINION

This is an appeal from the United States Bankruptcy Court, Northern District of Alabama, Southern Division. The issue on appeal is whether a payment of a check, as restitution pursuant to the Alabama Worthless Check Act, qualifies as a voidable preference under 11 U.S.C. 547, and therefore recoverable by the trustee in bankruptcy.

Both parties filed on July 3, 1990 in the bankruptcy court a statement of agreed facts without objections. The statement admits:

> 1. . . . that Car Renovators ("Debtor") filed a Voluntary Petition for Relief under Chapter 11 of Title XI of the United States Bankruptcy Code on March 3, 1989.

2. . . . that Thomas E. Reynolds was appointed Trustee of the Debtor's bankruptcy estate on May 23, 1989.

3. . . . that the Chapter 11 Proceeding was converted to a Chapter 7 Proceeding pursuant to Court Order dated June 7, 1989, and that Thomas E. Reynolds was appointed Trustee in the Chapter 7 case.

4. . . . that Dixie Nissan is a corporation which does business by agent in Jefferson County, Alabama.

5. . . . that this Court has jurisdiction over this Adversary Proceeding pursuant to 28 U.S.C. §1334 and pursuant to §547 of the Bankruptcy Code.

6. . . . that this is a core proceeding under 28 U.S.C. §157(b)(2)(F).

7. . . . that James Gann acting as President of Car Renovators purchased parts for Car Renovators from Dixie Nissan and gave two checks drawn on the account of Car Renovators to Dixie Nissan as payment for these parts.

8. . . . that these checks were returned for insufficient funds in the account of Car Renovators.

9. . . . that on or about December 21, 1988, and on or about December 22, 1988, James H. Gann went to the Defendant's place of business and purchased car parts and other supplies. In exchange for the car parts and other supplies, he tendered two checks which were returned for insufficient funds. After these checks were returned for insufficient funds, the appropriate ten days notices were mailed out before criminal prosecution was commenced. The checks were then turned over to Sam Russell, the District Attorney for the Bessemer Division of Jefferson County, Alabama, and at that same time, two warrants for the arrest of James H. Gann were signed and issued for his violating Section 13A-9-13.1 of the Code of Alabama. At that time, the District

Attorney's Office, through the worthless check unit, contacted James H. Gann and advised him that two warrants had been issued for his arrest and that he had ten days to pay these checks or else he would be arrested pursuant to Alabama Code § 12-17-224.

10. . . . that on February 13, 19[89], James H. Gann acting as President of Car Renovators obtained a cashier's check to cover the two previous bad checks with a check dated February 13, 1989, check number 18 drawn on the account of Car Renovators and payable to the order of _____ _____ in the amount of Two Thousand Seven Hundred Forty Four and 62/100 Dollars ($2,744.63), and this check bore the notation that it was for "two ch. — Dixie Nissan" (hereafter referred to as the "Car Renovators' Checks"). The check was signed by James H. Gann and was drawn on the account of Car Renovators.

11. . . . that the cashier's check obtained by the Car Renovators' Check was received by Samuel L. Russell, District Attorney for the Bessemer Division of Jefferson County, Alabama.

12. . . . that the Defendant received Two Thousand Seven Hundred Seventy Four and 63/100 Dollars ($2,774.63) from Samuel L. Russell, District Attorney for the Bessemer Division of Jefferson County, Alabama, to cover the two bad checks.

13. . . . that said money was received within ninety (90) days before the filing of the Debtor's Bankruptcy Petition.

14. . . . that the Car Renovators' Check was cashed within ninety (90) days before the filing of the Debtor's Chapter 11 Petition.

15. . . . that the Defendant, Dixie Nissan, did not receive any notice of the bankruptcy proceeding until the summons, notice of pre-trial hearing and complaint to recover a preferential transfer

in this Adversary Proceeding were served in April of 1990.

The judge of the Bankruptcy Court held an adversary proceeding to determine whether the payment qualified as a preference. The court held that because the check was received and cashed by Dixie Nissan within 90 days before the filing of the debtor's bankruptcy petition, and that because the check was cashed while the debtor was insolvent, it was a claim paid from the debtor's assets under facts and circumstances that satisfied the requirements of Section 547, and could therefore be recovered by the trustee.

A timely appeal was filed by Dixie Nissan. The Alabama District Attorneys Association and the District Attorney for the Bessemer Division of Jefferson County were allowed to file an amicus curiae brief and to participate in oral arguments. This court hear oral arguments on December 17, 1990.

After taking into consideration the unusual facts in this case and hearing the very able oral arguments of all the interested parties, and after a careful study of the briefs and the record, this court is convinced that the Bankruptcy Court's judgment should be reversed.

Conclusions of law made by the Bankruptcy Court are to be reviewed *de novo. In re Hartley,* 75 B.R. 394 (S.D. Ala. 1987); *Citicorp, Inc. v. Davidson Lumber Co.,* 718 F.2d 1030, 1032 (11th Cir. 1983). This court agrees with the Bankruptcy Court that payment of the two bad checks qualifies as a preference. Nevertheless, because of the unusual factual circumstances of this case, this court is of the opinion that this payment should be an exception to repayment.

In *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), the United States Supreme Court held that restitution obligations imposed as a condition of probation in state criminal proceedings are not dischargeable under Section 523(c)(7) of the Bankruptcy Code.

In case of *In re Nelson,* 91 B.R. 904 (N.D.Cal. 1988) took *Kelly* a step further, holding that restitution is not only excepted

from discharge, it is also excepted from *avoidance under §547* (emphasis added).

This court is persuaded by the reasoning of Judge Lynch in *In re Nelson*:

> If anything, avoidance of restitution obligations is seemingly even more intrusive and disruptive of the state's criminal justice system than discharge of restitution. Far beyond merely extinguishing a debt that *ought* to be paid in the future, the trustee seeks to recover restitution that *has* been paid. . . . [Such a] claim would thus turn the state's criminal justice system on its head in a federal bankruptcy proceeding: the state and the crime victim are the defendants, the criminal is the complainant. There can be no doubt that such an ironic and unseemly specter would impose undue burdens and uncertainties on the state (not to mention the victim), would lead to federal remission of state criminal judgments, and would hamper the sentencing decisions of state judges.

904 B.R. at 906 (emphasis supplied).

As the appellant's brief suggests, if a trustee in bankruptcy is allowed to recover funds which a debtor has paid as restitution pursuant to the Worthless Check Act, then the victim of the worthless check crime would be victimized a second time by the Bankruptcy Court. If Car Renovators is allowed to recoup the amount it paid as restitution, Dixie Nissan would be out its money for a second time and Alabama's Worthless Check Act would indeed be made worthless. In order to recover restitution, fines and court costs properly assessed by state law, District Attorneys and victims of worthless check crimes would be forced to appear before the Bankruptcy Court. This disruption would effectively negate the purpose of the worthless check statute.

While *Kelly* and *In re Nelson* dealt with court-ordered restitutions stemming from convictions, this court sees no reason why the rationale should not be extended to cover restitution agreements arising out of Alabama's Worthless Check Act;

therefore, this court adopts the holding of *In re Nelson*. Accordingly, criminal restitution imposed by Alabama's Worthless Check Act is excepted from avoidance in Chapter 7 cases under §547 of the Bankruptcy Code.

For the reasons heretofore stated, the judgment of the Bankruptcy Court is hereby REVERSED and REMANDED for proceedings not inconsistent with this opinion.

An order in conformity with this memorandum opinion will be entered.

This the 3rd day of January, 1991.

/s/ C. W. Allgood
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In the Matter of:	}	
	}	
CAR RENOVATORS, INC.	}	CASE NO. 89-04485
	}	
Debtor.	}	
	}	
THOMAS E. REYNOLDS, Trustee of the Bankruptcy Estate of Car Renovators, Inc.	}	
	}	
Plaintiff,	}	
versus	}	
	}	A.P. NO. 90-0158
DIXIE NISSAN, a corporation,	}	
	}	
Defendant.	}	

FINAL ORDER AND JUDGMENT

The above adversary proceeding came on for final hearing on July 3, 1990 after notice. Present were Mary J. Perry, Attorney for the Trustee; and Andrew LaPlante, Attorney for Defendant, Dixie Nissan.

A statement of Agreed Facts signed by the attorneys was filed in open court. The facts there stated are here adopted by this court as its finding of facts in this adversary proceeding.

Mr. LaPlante argued that the $2,744.63 paid by Mr. James H. Gann constituted restitution under state procedures in a criminal case. *See* § 13A-9-13.1, *et seq.* and § 12-17-224, Code of Ala. 1975. He contended that this bankruptcy court has no authority to interfere with such procedures even where the

payment by Debtor amounted to voidable preference under Section 547 of the Bankruptcy Code.

The Supreme Court has held that restitution obligations imposed as a condition of probation in state criminal proceedings are not dischargeable under Section 523(c)(7) of the Bankruptcy Code. *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

The Eleventh Circuit has held that a bankruptcy court cannot enjoin a state from prosecuting a debtor for giving worthless checks, even though restitution would be mandatory on conviction. *Barnette v. Evans,* 673 F.2d 1250 (11th Cir. 1982). However, these cases are distinguishable from the case now before this court.

There is no question here whether a claim is or is not excepted from discharge. The Trustee does not seek to enjoin Dixie Nissan or the State of Alabama from prosecuting the Debtor's president for giving worthless checks of the Debtor. The question is whether Dixie Nissan's receipt of its claim constituted a preference the Trustee may avoid under Section 547 of the Bankruptcy Code. This court perceives no conflict between Section 547, whose object is to equalize distribution to Debtor's creditors, and the state procedures for the collection of worthless checks.

It is irrelevant here whether the collection by Dixie Nissan was made under the criminal process or through a civil proceeding. It is relevant only that Dixie Nissan's claim was paid from Debtor's assets under facts and circumstances that satisfied the requirements of a preference recoverable by the Trustee from Dixie Nissan. The amount actually received by Dixie Nissan was $2,674.63 ($2,774.63 paid to the District Attorney's Office by Mr. Gann less $100.00 costs deducted by the District Attorney.)

It is accordingly now ORDERED, ADJUDGED and DECREED that the Plaintiff, Thomas E. Reynolds, as Trustee of the Bankruptcy Estate of the Debtor, Car Renovators, Inc., have and recover of the Defendant, Dixie Nissan, the sum of

$2,674.63 with the costs of this adversary proceeding, for which execution may issue.

IT IS SO ORDERED this the 6th day of July, 1990

/s/ Clifford Fulford
CLIFFORD FULFORD
United States Bankruptcy Judge

CF/mnt

xc: Debtor
Mary J. Perry
Andrew LaPlante
Thomas E. Reynolds
Benjamin Cohen, Bankruptcy Administrator

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-7043

IN RE: CAR RENOVATORS,

Debtors.

THOMAS E. REYNOLDS, Trustee
of the Bankruptcy Estate of
Car Renovators, Inc.,

Plaintiff-Appellant,

versus

DIXIE NISSAN,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING
(DECEMBER 19, 1991)

BEFORE: COX and DUBINA, Circuit Judges, and
GODBOLD, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by Appellee, Dixie Nissan, is denied.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina

UNITED STATES CIRCUIT JUDGE

UNITED STATES CODE
TITLE 11

Section 101. DEFINITIONS

(4) "claim" means —

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured; . . .

(9) "creditor" means —

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim; . . .

(11) "debt" means liability on a claim; . . .

(50) "transfer" means —

every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption; and . . .

UNITED STATES CODE
TITLE 11

Section 547. PREFERENCES

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of an interest of the debtor in property —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and . . .

(G) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

CODE OF ALABAMA 1975
TITLE 12

§ 12-17-224. Special services division; worthless check unit; guidelines for processing worthless check complaints; fees and restitution; collection and distribution.

(a) Each district attorney is hereby authorized and empowered to establish in his discretion, a special services division of his office which shall be under his direction and control and shall be organized for the following uses and purposes:

(1) A section of the special services division of each such district attorney's office may be organized as worthless check unit. Each district attorney who elects to establish said unit shall assign sufficient staff and resources to effectively operate said unit. The worthless check unit of the special services division of the district attorney's office shall be created for the purpose of processing worthless checks.

(2) Procedures:

a. Complaint referrals. — After following the requisites of section 13A-9-13.1, any party holding a worthless negotiable instrument may present a "complaint" to the worthless check unit of the special services division of the district attorney's office. Upon receipt of such complaint, said complaint shall be evaluated by the worthless check unit, under the direction of the district attorney to determine whether or not said complaint is appropriate to be processed by the worthless check unit.

1. Guidelines to be used in the determination of whether a complaint has been appropriately filed may include but are not limited to the following:

(i) The amount of the check as recited in the complaint;

(ii) Whether the defendant has a prior criminal record of violations involving issuing worthless checks;

(iii) The number of checks previously received by the district attorney on this particular defendant;

(iv) Whether the defendant has any worthless check charges pending; and

(v) The strength of the evidence of intent to defraud the victim.

§ 12-77-224

2. Complaint withdrawals. — If after filing a "complaint" with the worthless check unit the victim wishes to withdraw the complaint for good cause, the victim shall satisfy the service charge of $30.00 to the worthless check unit for processing said complaint.

b. Notice. — After approval of the complaint, a warrant may be issue by an appropriate warrant magistrate, and the warrant may be held by the worthless check unit. After issuance of a warrant or upon approval of a complaint by the worthless check unit, the unit shall notify the individual charged with violating section 13A-9-13.1 by issuing a notice to such individual that a warrant has been issued for his arrest or that a complaint has been received by the worthless check unit. Said notice may be sent by mail. Such notice shall inform said accused that he may be eligible for deferred prosecution for violation of section 13A-9-13.1 by voluntarily surrendering himself to the worthless check unit within 10 business days from the date of the notice.

c. Voluntary surrender. — Upon voluntary surrender, the accused may be presented with the warrant or complaint and prosecution of same may be deferred upon payment of restitution and the service charge for processing the check, to the worthless check unit. Upon

election by the worthless check unit, the accused may sign a restitution agreement which shall contain the terms by which the restitution and the service charge may be paid.

d. Nonsurrender. — If, after receiving said notice, the accused shall not voluntarily surrender himself to the worthless check unit within the 10 business days prescribed in said notice, said violation shall be prosecuted in accordance with applicable laws and procedures.

e. Fees and restitution.

1. Definitions.

(i) FEES. The worthless check unit of the special services division of the district attorney's office may charge a service charge in the stated amount in the following circumstances:

I. In those cases where the accused has been notified by mail that a warrant has been issued an same may be criminally prosecuted unless he voluntarily surrenders himself to the worthless check unit within 10 business days from the date of said notice, and if such an accused voluntarily surrenders himself pursuant to said notice within the aforesaid 10 business days, the worthless check unit may collect the sum of $40.00 from the accused as a service charge for processing said check. This service charge shall be increased in the same dollar amount as the court cost charged by the district court of said judicial circuit for violations of section 13A-9-13.1 when said court cost shall be increased.

II. In those cases when the accused does not appear within 10 business days from the date of the notice issued to the accused, or if no restitution agreement is made, or if the accused does not comply with the restitution agreement the case may be prosecuted in accordance with applicable laws and procedures. Upon appearance of said accused in the district or circuit court

of said judicial circuit or the equivalent thereof and upon a finding of guilty or a plea of guilty, the court shall order the accused to satisfy an additional service charge equal to 85% of the court cost levied by the court for said offense. This amount shall not be in lieu of, but shall be in addition to, court costs assessed by the district or circuit court for said violation. Further, said service charge is to be paid to the general fund of the county to be disbursed pursuant to this section and shall not decrease any amounts allocated to any county or state agency from the court costs collected by the district or circuit court.

(ii) RESTITUTION. Restitution shall be defined as the face amount of any negotiable instrument (in the event of the issuance of a forged or altered instrument, restitution shall be in the amount to which the instrument was changed or altered), plus any amounts the victim may have been required to pay to a bank as a result of having attempted to process the worthless instrument.

I. Upon filing a complaint with the worthless check unit, the victim waives the right to collect restitution directly from the defendant.

II. Restitution agreements. — After an accused has been sent notification by mail of the warrant issued for his arrest and upon voluntarily surrendering himself to the worthless check unit, the worthless check unit may enter into a restitution agreement with the accused as to the terms by which the accused shall satisfy restitution and fees to the worthless check unit. The terms of said restitution agreements shall be determined on a case by case basis by the worthless check unit, but the duration of any said agreement shall be no longer than a period of six months. No interest may be charged or collected on either restitution or fees charged. Said restitution agreement shall be signed by the accused and must be ratified by the worthless check unit before it is effective. If the ac-

cused does not honor each term of the restitution agreement signed by him, the district attorney's office may proceed with the prosecution of the accused as provided by law.

2. Collection and distribution.

(i) Restitution. — Restitution shall be collected by the worthless check unit and deposited into an account maintained solely for such purpose. The worthless check unit shall, after a reasonable time for accounting and bookkeeping purposes, disburse to the victim all restitution collected with regard to the original complaint filed.

(ii) If the victim cannot be located after a reasonable time and upon diligent efforts to locate same, the restitution due said victim shall be deposited into the worthless check fund as herein provided.

(iii) Fees. — All fees or charges, other than court costs, collected by the worthless check unit in accordance with this section shall be paid to the county treasurer of said county in a fund to be known as the worthless check fund. Sixty-five percent of funds collected pursuant to subsection (a)(2)e.1.(i)i of this section shall be used and expended by the district attorney to defray the reasonable expenses incurred by the office of the district attorney. The district attorney is hereby authorized to requisition and expend these funds for those purposes. The treasurer of the county shall make disbursements of said funds upon requisition of the district attorney. Provided further this paragraph shall not reduce the amount payable to the district attorney under any local act, specifically Act No. 83-483. Thirty-five percent of said funds shall be used by the country for the reasonable expenses incurred in the administration of said program. All of the funds collected pursuant to subsections (a)(2)e.1.(i)II and (a)(2)e.1.(ii) shall be deposited in the general fund of the country and shall be expended only

for the reasonable and necessary expenses of law enforcement.

(b) This section shall in no way prohibit or preclude the office of the district attorney from proceeding with the prosecution of any violation of section 13A-9-13.1 as provided by applicable law and procedures heretofore enacted.

(Acts 1985, 1st Ex. Sess., No. 84-704, p. 35)

ALABAMA CODE 1975
TITLE 13

§ 13A-9-13.1. Negotiating worthless negotiable instrument — Generally.

(a) A person commits the crime of negotiating a worthless negotiable instrument if he negotiates or delivers a negotiable instrument for a thing of value and with the intent, knowledge or expectation that it will not be honored by the drawee.

(b) For the purposes of this section, it is prima facie evidence that the maker or drawer intended, knew or expected that the instrument would not be honored if:

(1) The maker or drawer had no such account with the drawee at the time the negotiable instrument was negotiated or delivered, as determined according to section 7-3-503(2); or

(2) Payment was refused by the drawee for lack of funds, upon presentation within 30 days after delivery, and the maker or drawer shall not have paid the holder thereof the amount due thereon, together with a service charge of not more than $10.00, within 10 days after receiving written notice from the holder of the instrument that payment was refused upon such instrument, as provided in section 13A-9-13.2; or

(3) Notice that payment was refused is mailed by certified or registered mail and is returned undelivered to the sender, when such notice is mailed within a reasonable time after dishonor to the address printed on the instrument or given by the maker or drawer at the time of issuance of the instrument.

(c) Negotiating a worthless negotiable instrument is a Class A misdemeanor.

(d) The definition of "negotiable instrument" in section 7-3-104 applies to this section and sections 13A-9-13.2 and 13A-9-13.3

(e) The definition of "negotiation" in section 7-3-202 applies to this section and sections 13A-9-13.2 and 13A-9-13.3.

(f) The definition of "delivery" in section 7-1-201(14) applies to this section and sections 13A-9-13.2 and 13A-9-13.3. (Acts 1980, No. 80-200, p. 279, § 1.)

§ 13A-9-13.2. Same — Notice of refusal of payment upon instrument.

For purposes of section 13A-9-13.1:

(1) Notice mailed by certified or registered mail, evidenced by return receipt, to the address printed on the instrument or given at the time of issuance shall be deemed sufficient and equivalent to notice having been received by the person making, drawing, uttering or delivering said instrument.

(2) The form of notice shall be substantially as follows:

"This statutory notice is provided pursuant to section 13A-9-13.2 of the Alabama Code. You are hereby notified that a check or instrument numbered _____, apparently issued by you on _____ (date), drawn upon _____ (name of bank), and payable to _____, has been dishonored. Pursuant to Alabama law, you have 10 days from receipt of this notice to tender payment of the full amount of such check or instrument plus a service charge of not more than $10.00, the total amount due being $_____. Unless this amount is paid in full within the specified time above, the holder of such check or instrument may assume that you delivered the instrument with intent to defraud and may turn over the dishonored instrument and all other available information relating to this incident to the proper authorities for criminal prosecution."

(3) Any party holding a worthless negotiable instrument and giving notice in substantially similar form to that provided in subdivision (2) of this section shall be immune from civil or criminal liability for the giving of such notice and for proceeding under the forms of such notices. (Acts 1980, No. 80-200, p. 279, § 2.)

§ 13A-9-13.3. Same — Prima facie evidence of identity.

(a) In any prosecution or action under the provisions of section 13A-9-13.1, a negotiable instrument for which the information required in subsections (b) and (c) of this section is available at the time of issuance shall constitute prima facie evidence of the identity of the party issuing the negotiable instrument and that such person was a party authorized to draw upon the named account.

(b) To establish this prima facie evidence, the following information regarding the identity of the party presenting the negotiable instrument shall be requested by the party receiving such instrument: the presenter's name, residence address, and home phone number. Such information may be provided by either of two methods:

(1) It may be recorded upon the negotiable instrument itself; or

(2) The number of a check-cashing identification card issued by the receiving party may be recorded on the negotiable instrument. Such check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.

(c) In addition to the information required in subsection (b) of this section, the party receiving a negotiable instrument shall witness the signature or endorsement of the party presenting such negotiable instrument and, as evidence of such, the receiving party shall initial the negotiable instrument. (Acts 1980, No. 80-200, p. 279, § 3.)

Supreme Court, U.S.
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OFFICE OF THE CLERK

(2)

No. 91-1520

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

IN RE: CAR RENOVATORS, INC.

HEART OF DIXIE NISSAN, INC.,
d/b/a DIXIE NISSAN,

Petitioner,

v.

THOMAS E. REYNOLDS, Trustee of
the Bankruptcy Estate of
Car Renovators, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE STATE OF ALABAMA IN SUPPORT OF THE PETITIONER

JAMES H. EVANS
Attorney General of the
State of Alabama

MARGARET SCHOLTEN CHILDERS
(Counsel of Record)
Assistant Attorney General
Office of the Attorney
General
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

TABLE OF CONTENTS

PAGE

Table of Authorities..... ii

Interest of Amicus Curiae..... 1

Statement of the Case..... 2

Summary of the Argument..... 8

Argument.....11

I. THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION IN THIS CASE IN A WAY THAT CONFLICTS WITH THIS COURT'S INTERPRETATION OF SIMILAR STATUTORY LANGUAGE IN KELLY V. ROBINSON, 479 U.S.36 (1986).. 11

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.....31

Conclusion.....33

Appendix.....A-1

TABLE OF AUTHORITIES

CASES: PAGE(S)

Ex parte Yarber, 437 So.2d 1330
(Ala. 1983). 25

Fenner v. Boykin,
271 U.S. 240 (1926)..... 16

In re Button, 8 B.R. 692
(Bankr. W.D. N.Y.(1981)..... 25

In re Chase, 43 B.R. 739
(Bankr. D. Md. 1984)..... 30

In re D.A.C. Meats, Inc., 8 B.R. 230
(Bankr. S.D. N.Y. 1981)..... 30

In re Dervos, 37 B.R. 731
(Bankr. N.D. I11. 1984)..... 28

In re Fussell,
928 F.2d 712 (5th Cir. 1991).... 28

In re Nelson, 91 B.R. 904
(Bankr. N.D. Cal. 1988)..... 32

In re Pelligrino, 42 B.R. 129
(Bankr. D. Conn. 1984)..... 28

Irvin v. State, 44 Ala. App. 101,
203 So.2d 283 (1967)..... 19

Kelly v. Robinson,
479 U.S. 36 (1986)..... passim

Kressler v. State, 462 So.2d 785
(Ala.Crim.App. 1984),
cert. denied (Ala. 1985)..... 25

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

Lewis v. Diethorn,
893 F.2d 648 (3rd Cir. 1990)..... 30

Pennsylvania Welfare Department
v. Davenport, 110 S.Ct.
2126 (1990)..... 28,29

Professional Check Service v. Dutton,
560 So.2d 755 (Ala. 1990)..... 19,20

Ray v. State, 484 So.2d 524
(Ala.Crim.App. 1985),
cert. denied (Ala. 1986)..... 25

Russell v. State, 533 So.2d 725
(Ala.Crim.App.1988),
cert. denied (Ala. 1988)..... 18

Rizzo v. Goode,
423 U.S. 362 (1976)..... 16

Santobello v. New York,
404 U.S. 257 (1971)..... 20

Steeley v. City of Gadsden,
533 So.2d 671
(Ala.Crim.App. 1988),
cert. denied (Ala. 1988)..... 19,25

Steeley v. State, 533 So.2d 665
(Ala.Crim.App. 1988), cert.
denied (Ala. 1988)..... 19

Tolbert v. State, 294 Ala. 738,
321 So.2d 227 (1975)..... 19

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

United States v. Caddell,
830 F.2d 36 (5th Cir. 1987).... 28,32

Willis v. State, 480 So.2d 56
(Ala.Crim.App. 1985),
cert. denied (Ala. 1985)..... 18

Younger v. Harris,
401 U.S. 37 (1971)..... 16

STATUTES:

11 U.S.C. §362(b)(1)..... 27,29

11 U.S.C. §523(a)(7)..... 11

11 U.S.C. §547(b)(1)..... 12

11 U.S.C. §547(b)(2)..... 12

11 U.S.C.§547(g)..... 22

Pub. L. 101-647, 104 Stat. 496..... 29

ALA. CODE §12-17-224 (1986)..... 20

ALA. CODE §12-17-224(a)
(1986 & Supp. 1991)..... 5

ALA. CODE §12-17-224(a)(2)b.
(1986 & Supp. 1991)..... 5

ALA. CODE §12-17-224(a)(2)c.
(1986 & Supp. 1991)..... 6

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

ALA. CODE §12-17-224(a)(2)e.1.(ii) (1986 & Supp. 1991)..... 6

ALA. CODE §13A-5-7(a)(1) (1982)..... 17

ALA. CODE §13A-5-12(a)(1) (1982)..... 17

ALA. CODE §13A-9-13.1(a) (1982 & Supp. 1991)..... 3

ALA. CODE §13A-9-13.1(b)(2) (1982 & Supp. 1991)..... 3

ALA. CODE §13A-9-13.1(c) (1982 & Supp. 1991)..... 17

ALA. CODE §13A-9-13.2(2) (1982 & Supp. 1991)..... 3

ARIZ. REV. STAT. ANN. §13-1810 (1989)..... 31

CAL. PENAL CODE §1001.60, et seq. (Supp. 1992)..... 31

IND. CODE §33-14-1-7 (1985 & Supp. 1991)..... 31

OKLA. STAT. tit. 22, §111, et seq. (1991)..... 31

W.VA. CODE §61-3-39, et seq. (1989)..... 31

TABLE OF AUTHORITIES (CONT'D)

PAGE(S)

OTHER AUTHORITIES:

§13A-9-13.1 through 13A-9-13.3
Commentary..... 18

22 C.J.S. Criminal Law §§373-374
(1989)..... 25

INTEREST OF AMICUS CURIAE

The Amicus State has a vital interest in preserving the integrity of its statutes involving the crime of negotiating a worthless negotiable instrument. It also has a vital interest in avoiding the unwarranted interference in the conduct and administration of its criminal justice system which is occasioned by the decision of the court of appeals. The State has a compelling interest in ensuring the orderly administration of its criminal statutes and in preserving the integrity of the results of its criminal prosecutions. It also has an interest in avoiding the expense and inconvenience of pursuing an increased number of prosecutions through to judgment, which is a likely result of the Eleventh Circuit's decision in this case.

The Attorney General of the State of Alabama is the chief law officer of the State of Alabama, and he is ultimately

responsible for the prosecution of the State's criminal laws. He is charged with representing and defending the interests of the State and its political subdivisions and officials.

STATEMENT OF THE CASE

On December 21 and 22, 1988, James H. Gann, the President of Car Renovators, Inc., purchased some car parts and supplies from Dixie Nissan on behalf of Car Renovators, Inc. Gann gave two checks drawn on Car Renovators' bank account to Dixie Nissan at that time as payment. These two checks later were returned to Dixie Nissan for insufficient funds in Car Renovators' account.

"A person commits the crime of negotiating a worthless negotiable instrument if he negotiates or delivers a

negotiable instrument for a thing of value and with the intent, knowledge or expectation that it will not be honored by the drawee." ALA. CODE §13A-9-13.1(a) (1982 & Supp. 1991). As in many other states, Alabama law provides that certain circumstances, including failure to pay within ten days of written notice that payment was refused, constitutes prima facie evidence that the maker or drawer intended, knew or expected that the instrument would not be honored. ALA. CODE §13A-9-13.1(b)(2) (1982 & Supp. 1991). The form of the notice given must be substantially that specified in ALA. CODE §13A-9-13.2(2) (1982 & Supp. 1991), which includes notice that if payment is not made, the holder may assume that the instrument was delivered with intent to defraud and may turn the incident over to the proper authorities for prosecution.

After the two Car Renovators checks were returned for insufficient funds, Dixie Nissan mailed to Gann the foregoing described notice. Gann did not respond. Dixie Nissan then reported the incident to the District Attorney for the Bessemer Division of Alabama's 10th Judicial Circuit (commonly referred to as the Bessemer Division of Jefferson County).

Each district attorney in Alabama is statutorily authorized to establish a division in his or her office for the purpose of processing complaints of negotiating a worthless negotiable instrument. After following the requirements of §13A-9-13.1 and §13A-9-13.2, a holder of a worthless negotiable instrument may present a complaint to this division. The complaint is then evaluated, under the direction of the district attorney, to determine whether the complaint is appropriate for prosecution. There are

several statutory guidelines to determine whether a complaint has been appropriately filed. ALA. CODE §12-17-224(a) (1986 & Supp. 1991).

If a complaint is approved, a warrant may be issued by an appropriate warrant magistrate. Either after issuance of a warrant or upon approval of the complaint, the district attorney's office sends a written notice to the individual charged with violating §13A-9-13.1 that a warrant has been issued for his arrest or that a complaint has been received. The notice informs the individual that he may be eligible for deferred prosecution by voluntarily surrendering himself. ALA. CODE §12-17-224(a)(2)b. (1986 & Supp. 1991).

If the accused individual voluntarily surrenders himself, the district attorney is authorized to defer prosecution upon payment of restitution and fees. It is in the discretion of the district

attorney whether to continue prosecution through to judgment or whether to defer prosecution pursuant to a restitution agreement. ALA. CODE §12-17-224(a)(2)c. (1986 & Supp. 1991). Restitution is statutorily defined as the face amount of the instrument plus any amounts the victim may have been required to pay to a bank as a result of having attempted to process the instrument. ALA. CODE §12-17-224(a)(2)e.1.(ii) (1986 & Supp. 1991).

The district attorney for the Bessemer division of Jefferson County has established a division in his office pursuant to the foregoing statute. Dixie Nissan's complaints against Gann were approved for prosecution. Two warrants for Gann's arrest for violating §13A-9-13.1 then were issued by a warrant magistrate. The district attorney's office then sent

the statutory notice under §12-17-224 to Gann.

On February 13, 1989, Gann wrote a check on the account of Car Renovators and used this check to purchase a cashier's check. He then gave the cashier's check to the district attorney. The amount of the check equaled the statutorily authorized restitution and fees for deferred prosecution. Prosecution of Gann was deferred. The district attorney's office subsequently gave the restitution amount to Dixie Nissan.

On March 3, 1989, Car Renovators, Inc., filed a bankruptcy petition. Dixie Nissan had no notice of the bankruptcy proceeding until April, 1990, when it received the adversary complaint to recover the restitution monies it had received on the ground that these monies constituted an avoidable preference.

The course of the judicial proceedings below are fully set forth in the

Statement of the Case in the Petition For Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The court below decided that the restitution payment made in this case by the Debtor's president after criminal prosecution had been commenced against him, which was made pursuant to a statutorily authorized exercise of discretion by the district attorney over the proper disposition of such prosecutions, constituted an avoidable preference under the Bankruptcy Code which is recoverable from the victim to whom the restitution payment was transferred by the district attorney. This decision conflicts with this Court's decision in Kelly v. Robinson, 479 U.S. 36 (1986), that restitution payments are to and for the benefit of the state and not compensation to the victim/creditor. It is based upon a too narrow reading of this

Court's opinion in Kelly, and also upon a serious understatement of the scope of proper federalism concerns.

The Eleventh Circuit's opinion also is based in part upon the erroneous conclusion that there was no criminal prosecution in this case. A criminal prosecution was commenced in this case. Continued prosecution was deferred upon payment of restitution and fees, pursuant to a statutorily authorized exercise of discretion by the prosecutor. The Eleventh Circuit's decision undermines the integrity of the result of this criminal prosecution, and it is likely to interfere with the exercise of prosecutorial discretion concerning the appropriate disposition of future prosecutions. It will lead to an increased number of prosecutions having to be pursued through to judgment, which will benefit no one.

The transfer in this case was neither "to or for the benefit of a creditor" nor "for or on account of an antecedent debt." Thus, it did not constitute an avoidable preference. A contrary interpretation would lead to the anomalous result that restitution payments could be compelled in a criminal prosecution during a bankruptcy proceeding under a statutory exception to the automatic stay yet be avoided as a preference.

The federal question in this case, whether restitution payments that are made in the disposition of a criminal proceeding constitute an avoidable preference under the Bankruptcy Code, is an important question which should be decided by this Court. Probably every state in the union has a worthless check statute. Several other statutorily authorized the deferral of adjudication and/or prosecution in

conjunction with the payment of restitution, and others do this informally. At least two federal courts have indicated that restitution payments are not preferential transfers, contrary to the opinion of the Eleventh Circuit in this case.

ARGUMENT

I. THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION IN THIS CASE IN A WAY THAT CONFLICTS WITH THIS COURT'S INTERPRETATION OF SIMILAR STATUTORY LANGUAGE IN KELLY V. ROBINSON, 479 U.S. 36 (1986).

In Kelly v. Robinson, 479 U.S. 36 (1986), this Court decided that restitution orders imposed in state criminal proceedings are not dischargeable in a Chapter 7 bankruptcy proceeding. This decision was based upon this Court's interpretation of the language in 11 U.S.C. §523(a)(7), which protects from discharge any debt which is "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental

unit, and is not compensation for actual pecuniary loss." This Court concluded that restitution orders imposed in state criminal proceedings operate "for the benefit of" the state, and that they are not assessed "for...compensation" of the victim. Kelly, 479 U.S. at 53.

In order to constitute an avoidable preference, there must be a transfer of an interest of the debtor in property, and this transfer must be "to or for the benefit of a creditor" and "for or on account of an antecedent debt owed by the debtor before such transfer was made." 11 U.S.C. §547(b)(1) and (2). This language is the obverse of the language in the dischargeability section that was examined in Kelly.

A debt is not dischargeable if it is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit which is not compensation for actual

pecuniary loss. A payment is an avoidable preference only if it is to or for the benefit of a creditor and for or on account of an antecedent debt. This Court already has decided that restitution obligations imposed in state criminal proceedings are not for the compensation of the victim, but rather are for the benefit of the state. Since restitution payments are not for the compensation of the victim/creditor, such payments do not constitute an avoidable preferential transfer by the very terms of the statute defining such transfers.

The Eleventh Circuit decided that the payment in this case had to be considered a preferential transfer because the payment was not made pursuant to a court order based upon a criminal conviction. The Eleventh Circuit's decision was reached, in part, upon a too narrow reading of this Court's opinion in Kelly. Some of the language in Kelly does pertain to the

deference due to criminal judgments, but the facts in Kelly involved such a judgment. It is much too simplistic to conclude on the basis of this language that only restitution payments made pursuant to a state court criminal judgment are payments for the benefit of the state, and that any other restitution payments are preferential transfers.

In the first place, this Court repeatedly emphasized in Kelly that the language in the Bankruptcy Code must be considered not only in light of the history of deference to criminal judgments but also "in light of the interests of the States in unfettered administration of their criminal justice systems." Kelly, 479 U.S. at 43-44. Interpretation of the Bankruptcy Code

> also must reflect...a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The

> right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions."

Kelly, 479 U.S. at 47 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)).

> "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." ... This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful considerations that should influence a court considering equitable types of relief... This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.

Kelly, 479 U.S. at 49 (footnote omitted) (quoting Bank of Marin v. England, 385 U.S. 99, 103 (1966)).

The Eleventh Circuit's decision also reflects a serious understatement of the true scope of federalism concerns. That

Court's opinion that federalism concerns arise only in the context of an ongoing criminal prosecution or with the potential interference with an actual state criminal judgment is simply wrong. As this Court stated in Younger v. Harris, 401 U.S. 37, 44 (1971), "Our Federalism" is a concept that represents a system with sensitivity to the legitimate interests of both state and national governments, in which the national government always endeavors to protect federal interests in a way that does not unduly interfere with the legitimate activities of the states, and a belief in according a proper respect for state functions and institutions. See also Fenner v. Boykin, 271 U.S. 240 (1926) (ordinarily a federal court will not enjoin state officers from instituting criminal prosecutions); Rizzo v. Goode, 423 U.S. 362, 378-380 (1976) (recognizing that the principles of federalism have not been

limited to criminal proceedings, much less to ongoing ones); and Kelly, 479 U.S. at 49 n.11.

The Eleventh Circuit's view that there are no legitimate federalism concerns in this case is also due in part to its erroneous conclusion that there was no criminal prosecution in this case. The court's opinion also reflects a lack of understanding and/or respect for the State, its statutes, and the legitimate role of a prosecutor in resolving criminal prosecutions short of judgment.

The crime involved in this case is a Class A misdemeanor. ALA. CODE §13A-9-13.1(c)(1982 & Supp. 1991). Upon conviction, a defendant is subject to incarceration for up to one year and a substantial fine. ALA. CODE §§13A-5-7(a)(1) and 13A-5-12(a)(1) (1982). These laws reflect a legislative determination that a criminal sanction is

necessary to punish the intentional negotiation of a worthless negotiable instrument in order to promote and maintain public confidence in negotiable instruments and to help preserve the integrity of commercial paper. §§13A-9-13.1 through 13A-9-13.3 Commentary. Statutes such as this are "drafted as a means of supplementing the ordinary laws of theft and false pretenses in the context of bad checks." Willis v. State, 480 So.2d 56, 58 (Ala.Crim.App.1985)(quoting Model Penal Code, §224.5 Comment (1980)), cert. denied (Ala. 1985). By prosecuting criminal actions against offenders, the State is protecting the integrity of commercial transactions within the state.

The crime of negotiating a worthless negotiable instrument is considered a crime of moral turpitude in Alabama, with several attendant consequences. Russell v. State, 533 So.2d 725, 728 (Ala.Crim.App. 1988),

cert. denied (Ala. 1988); and Irvin v. State, 44 Ala. App. 101, 203 So.2d 283, 287-288 (1967). Neither this law nor other Alabama criminal laws are designed to enforce the payment of a debt or to adjudicate civil disputes, and they may not be used to enforce a civil debt. Tolbert v. State, 294 Ala. 738, 321 So.2d 227, 232-233 (1975); Steeley v. State, 533 So.2d 665, 669-670 (Ala.Crim.App. 1988), cert. denied (Ala. 1988); and Professional Check Service v. Dutton, 560 So.2d 755, 758 (Ala. 1990).

Prosecution for this crime is commenced by the issuance of a warrant of arrest. Steeley v. City of Gadsden, 533 So.2d 671, 678-679 and 684 (Ala.Crim.App. 1988), cert. denied (Ala. 1988). See also Professional Check Service, 560 So.2d at 757. Whether to initiate such a prosecution is a matter within the discretion of the district attorney, and a complainant may not compel prosecution.

Professional Check Service, 560 So.2d at 758. The district attorney in this case determined that criminal prosecution upon Dixie Nissan's complaints was appropriate, and criminal prosecutions consequently were commenced against James H. Gann.

Section 12-17-224 expresses the state legislature's determination that there are cases in which disposition of such a prosecution upon a minimum of payment of complete restitution and fees adequately protects the societal interests at stake, and that the prosecutor should be allowed the discretion to determine when this is appropriate. This Court has formerly recognized that the disposition of criminal charges by agreement between the prosecutor and the accused is not only acceptable, but actually an "essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260-261 (1971).

In Kelly, this Court rejected the Eleventh Circuit's expressed belief in the instant case that a restitution payment is compensatory to the victim simply because it may be calculated based upon the monetary amount of harm the offender has caused. As this Court stated,

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. ... "[T]he obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose."

Kelly, 479 U.S. at 51-52 (quoting In re Pelligrino, 42 B.R. 129, 133 (Bankr. D. Conn. 1984)).

Prosecution of a criminal case is not aimed at obtaining a pecuniary benefit for the victim. It is designed to punish criminal offenders and deter future criminal conduct. Restitution is one of the methods of punishment and rehabilitation employed by the State. The fact that it results in the payment of a debt does not mean that it is payment of a debt. There is no reason to suppose that the prosecutor in this case did anything but act on a bona fide conclusion that the public interest would be served by accepting restitution and fees in disposition of this case.[1] After all, one of

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[1]It should perhaps be observed that the burden is on the trustee to prove the avoidability of a transfer under §547(b). 11 U.S.C. §547(g).

the purposes of restitution is to rehabilitate and deter future violations, and requiring full restitution peculiarly brings home to the offender that he has harmed a particular person as well as society in the abstract, and that he must accept full responsibility for his actions.

The victim has no control over what restitution, if any, he will receive as a result of a "worthless check" prosecution in Alabama. If the prosecutor decides that the case is one that is appropriate for deferred prosecution, the amount of restitution is set by the statute, and the time and manner of payment is negotiated between the defendant and the prosecutor. The victim has no control over the prosecutor's decision whether to prosecute, nor over his decision whether to agree to defer prosecution as opposed to continuing the prosecution to adjudication (in which

event the victim may or may not receive some or full restitution).

The district attorney's agreement in this case reflected a decision by the State that its penal interests would best be served by requiring Gann to make full restitution to his victim. If commencement of bankruptcy proceedings and the threat of avoidance had been apparent possibilities, the State likely would have chosen a different option to serve its penal interests. The retroactive vacation of the restitution payment in Gann's criminal prosecution significantly compromises the State's penal decision in this case and will discourage the use of this lesser penological option in the future.

Vacating the restitution payment in this case and other cases allows criminal offenders to use the bankruptcy laws as a haven from the consequences of criminal acts, contrary to the stated Congressional

intent. See In re Button, 8 B.R. 692 (Bankr. W.D. N.Y. 1981). Whether the State would be able to successfully prosecute an offender after a restitution payment is avoided is highly problematical. See Steeley v. City of Gadsden, 533 So.2d at 678-682 (regarding the possibility of a speedy trial problem); see also Ex parte Yarber, 437 So.2d 1330 (Ala. 1983); Kresler v. State, 462 So.2d 785 (Ala.Crim.App. 1984), cert. denied (Ala. 1985); Ray v. State, 484 So.2d 524, 526 (Ala.Crim.App. 1985), cert. denied (Ala. 1986); and 22 C.J.S. Criminal Law §§373-374 (1989) (regarding the complex problem of the enforceability of plea bargains and similar agreements).

Vacating a criminal restitution payment compromises the decision made by the prosecutor and the integrity of the result of the prosecution. An individual should not be allowed to avoid adjudication

and the potential consequences thereof by agreeing to make restitution, and then avoid his penal obligation by filing for bankruptcy. Individuals should not be permitted to use the bankruptcy law as a shield against a penal obligation merely because that obligation happens also to involve a monetary obligation. As the District Court stated in this case, avoidance in this case is intrusive and disruptive and results in the federal remission of the results of a state criminal prosecution.

In the future, lest the defendant avoid the penological effect of such a disposition by filing for bankruptcy, prosecutors probably will not be willing to use the less restrictive punishment option available under §12-17-224. This results in the loss of a viable and flexible alternative to trial. It also will result in the expense of increased numbers of

cases having to be adjudicated, and in the placing of an additional weight on an already overburdened court system.

This result also is contrary to the intended effect of a bankruptcy proceeding, i.e., to provide a fresh start for a debtor. The Eleventh Circuit decision discourages the use of a lesser penal sanction in favor of a criminal conviction with all of its attendant consequences.

As this Court recognized in Kelly, the text of a statute is only the starting point in interpreting statutory language, and the provisions of the whole law and its object and policy should be considered in expounding a statute. Kelly, 479 U.S. at 43. The longstanding policy against undue federal interference in state criminal proceedings has been expressly incorporated in 11 U.S.C. §362(b)(1), under which "the commencement or continuation of a criminal action or proceeding against the debtor" is

excepted from the automatic stay. Several courts have held that this provision permits the enforcement of criminal restitution obligations during a bankruptcy proceeding. See In re Dervos, 37 B.R. 731 (Bankr. N.D. I11. 1984); United States v. Caddell, 830 F.2d 36, 39 (5th Cir. 1987); and In re Pelligrino, 42 B.R. 129, 135 (Bankr. D. Conn. 1984).

In Caddell, the Fifth Circuit expressly rejected the contention that such a payment is preferential. In fact, it felt that this argument was "squarely precluded" by this Court's opinion in Kelly. Caddell, 830 F.2d at 39. See also In re Fussell, 928 F.2d 712, 717 (5th Cir. 1991).

In Pennsylvania Welfare Department v. Davenport, 110 S.Ct. 2126, 2132 (1990), this Court indicated that §362(b)(1) does not necessarily exempt governmental efforts to collect a restitution obligation from a

debtor from the automatic stay. However, this Court's interpretation of Congressional intent in Davenport has been contradicted by Congress itself, which quickly amended the Bankruptcy Code in the wake of the decision in Davenport, Pub.L.101-647, T.XXXI §3103, 104 Stat. 496 (codified as amended at 11 U.S.C. §1328(a)(3) (Supp. 1991)).

The State respectfully submits that enforcement of a criminal restitution obligation or the payment of restitution under a prosecution deferral statute such as Alabama's is permitted by §362(b)(1) during a bankruptcy proceeding, and that it is completely anomalous to hold that such a payment constitutes an avoidable preference.

In Kelly, this Court focused on the state's purpose and intent in imposing restitution obligations in determining that such obligations were for the benefit of the state and not the victim. Even if the

focus is shifted to the defendant's purpose, however, it is apparent that the restitution agreement and payment in this case does not constitute a preferential transfer under the terms of the Bankruptcy Code. Gann obviously made the payment not on account of the antecedent debt (the obligation of Car Renovators to pay for the supplies and parts purchased), but rather to avoid continuation of the criminal prosecution against himself and the attendant possibility of conviction and even incarceration. The payment was not even by or on behalf of the debtor corporation. See In re D.A.C. Meats, Inc., 8 B.R. 230, 232-233 (Bankr. S.D. N.Y. 1981); Lewis v. Diethorn, 893 F.2d 648, 650 (3rd Cir. 1990); and In re Chase, 43 B.R. 739, 745 (Bankr. D. Md. 1984).

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

Probably every state in the union has a worthless check statute. Several have statutorily authorized the deferral of adjudication and/or of prosecution in conjunction with the payment of restitution.[2] Others reach the same result without specific statutory authorization.

Diversionary programs of this type exist at both the state and federal levels. They are beneficial to first time and young offenders to prevent the cloud of a criminal record from affecting the individual's life. They also benefit the government by providing an appropriate

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[2] See, e.g., IND. CODE §33-14-1-7 (1985 & Supp. 1991); OKLA. STAT. tit. 22, §111, et seq. (1991); ARIZ. REV. STAT. ANN. §13-1810 (1989); CAL. PENAL CODE §1001.60, et seq. (Supp. 1992); and W.VA. CODE §61-3-39, et seq. (1989).

disposition of certain criminal prosecutions while also reducing clogging of the court system and avoiding the expense of prosecuting through to adjudication.

The issue in this case is related to the issue that this Court decided in Kelly v. Robinson, 479 U.S. 36 (1986). At least two federal courts have reached decisions contrary to that of the Eleventh Circuit in this case. See In re Nelson, 91 B.R. 904 (Bankr. N.D. Cal. 1988); and United States v. Caddell, 830 F.2d 36, 39 (5th Cir. 1987).

On the basis of the foregoing and in light of the consequences of the Eleventh Circuit's opinion discussed earlier in this brief, the State submits that this case presents an important question of federal law which has not been but should be decided by this Court.

CONCLUSION

For the reasons stated by Petitioner and for the reasons stated herein, the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted and the decision below should be reversed by this Honorable Court.

Respectfully submitted,

JAMES H. EVANS
Attorney General of the
State of Alabama

MARGARET SCHOLTEN CHILDERS
(Counsel of Record)
Assistant Attorney General
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0410H

APPENDIX*

*The verbatim text of other U.S. Code and Alabama Code provisions referred to herein are contained in the Appendix to the Petition For Writ Of Certiorari.

ALA. CODE 1975

§13A-5-7. SENTENCES OF IMPRISONMENT FOR MISDEMEANORS AND VIOLATIONS.

(a) Sentences for misdemeanors shall be a definite term of imprisonment in the county jail or to hard labor for the county, within the following limitations:

(1) For a Class A misdemeanor, not more than one year.

(2) For a Class B misdemeanor, not more than six months.

(3) For a Class C misdemeanor, not more than six months.

(b) Sentences for violations shall be for a definite term of imprisonment in the county jail, not to exceed 30 days. (Acts 1977, No. 607, p.812, § 1230; Acts 1978, No. 770 p. 1110.)

ALA. CODE 1975

§ 13A-5-12. FINES FOR MISDEMEANORS AND VIOLATIONS

(a) A sentence to pay a fine for a misdemeanor shall be for a definite amount, fixed by the court, within the following limitations:

(1) For a Class A misdemeanor, not more than than $2,000.00;

(2) For a Class B misdemeanor, not more than $1,000.00;

(3) For a Class C misdemeanor, not more than $500.00; or

(4) Any amount not exceeding double the pecuniary gain to the defendant or loss to the victim caused by the commission of the offense.

(b) A sentence to pay a fine for a

violation shall be for a definite amount, fixed by the court, not to exceed $200.00, or any amount not exceeding double the pecuniary gain to the defendant or loss to the victim caused by the commission of the offense.

(c) As used in this section, "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount or money or the value of property returned to the victim of the crime or seized or surrendered to lawful authority prior to the time sentence is imposed. "Value" shall be determined by the standards established in subdivision 14 of section 13A-8-1.

(d) The court may conduct a hearing upon the issue of defendant's gain or the victim's

loss from the crime according to procedures established by rule of court. (Acts 1977, No. 607, p. 812 § 1245; Act 1979, No. 79-471, p. 862, § 1.)

UNITED STATES CODE
TITLE 11

Section 362. Automatic Stay

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS §§ 301, 302, 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)) [15 USCS §78eee(a)(3)], does not operate as a stay -

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;